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NO. 89-1177

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

11126 BALTIMORE BLVD., INC.

(T/A WARWICK BOOKS),

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with the questions presented for review as set forth in the Petition for a Writ of Certiorari and submits the following as substitutions:

I. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING ORDINANCE WHICH INCLUDES CRITERIA SUCH AS: HARMONY WITH ZONING PLANS; AFFECT ON HEALTH, SAFETY AND WELFARE OF NEIGHBORING RESIDENTS; AND DETRIMENT TO ADJACENT PROPERTIES OR THE GENERAL NEIGHBORHOOD?

II. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING ORDINANCE WHICH PROVIDES FOR PUBLIC HEARINGS AND PLACES THE BURDEN OF PROOF ON APPLICANTS?

III. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS THAT NORMALLY TAKES SIX MONTHS, THAT GENERALLY ALLOWS CONTINUED OPERATION OF BOOKSTORES DURING

THE APPLICATION PROCESS, AND THAT PROVIDES FOR JUDICIAL REVIEW?

IV. IN ENACTING A CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES DID THE COUNTY COUNCIL HAVE A SUFFICIENT LEGISLATIVE BASIS FOR ACTION, AND MAY IT TAKE NOTICE OR ASSUME MATTERS OF COMMON KNOWLEDGE AND EXPERIENCE?

V. DOES THE FIRST AMENDMENT BAR A ZONING ORDINANCE WHICH CONFINES ADULT BOOKSTORES TO CERTAIN COMMERCIAL AND INDUSTRIAL ZONES AND IMPOSES SETBACK, SIGN AND WINDOW-BLACKENING REQUIREMENTS, WHEN THERE REMAIN NUMEROUS ALTERNATE SITES AVAILABLE FOR SUCH BOOKSTORES?

VI. DOES THE FIRST AMENDMENT REQUIRE THAT A COUNTY PROVIDE "GRANDFATHER" STATUS TO PRE-EXISTING ADULT BOOKSTORES WHEN ENACTING A VALID CONTENT-NEUTRAL ZONING ORDINANCE?

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STATEMENT OF THE CASE

The Prince George's County Council enacted zoning regulations governing adult bookstores in 1975, and modified those regulations in 1976 and 1980, 1987 and 1988.[1] Council Bill 156-1975, enacted on November 18, 1975, set forth the purpose of the adult bookstore legislation and established the standards to which such stores are required to conform. The preamble to the 1975 bill stated, in part, that its purpose was to "limit the location of

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[1] This case deals with the 1987 ordinance, since the 1988 revisions were made merely to conform the ordinance with the District Court's decision in this case. Except where specifically stated to the contrary, all references are to the 1987 version of the adult bookstore ordinance, since most of the revisions involved minor changes to the ordinance.

adult bookstores" to certain commercial zones, to require a special exception before a bookstore could be located in those commercial areas specifically zoned for adult bookstores, and to require "that [then] existing adult bookstores be modified in order to lessen their impact on the community." An adult bookstore was defined as

> Any commercial establishment that has twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

Council Bill 156-1975 § 1. In 1980, that definition was changed by reducing the stock percentage from 25 to 5 percent. Council Bill 116-1980.

The County's Zoning Ordinance generally provides that a special exception (including an application for an adult bookstore) may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this subtitle;
(2) The proposed use is in conformance with all the applicable requirements and regulations of this subtitle;
(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and
(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

Prince George's County Code § 27-317.

The Zoning Ordinance also placed specific operational and locational

conditions on adult bookstores, including set-back restrictions (limiting proximity to schools, libraries, parks, playgrounds, and churches), sign and advertising limitations, and window-blackening requirements. County Code §§ 27-248 and 27-331.

The court of appeals concisely and clearly described the "special exception" process as applied in zoning cases, including those for adult bookstores.

> Briefly, a special exception application begins with a review for compliance with zoning ordinances by the Technical Staff in the Zoning Division of the Planning Commission which issues a "Technical Staff Report" recommending approval, conditional approval or denial of the application. The application may be passed on to the County Planning Board and then reviewed in a public hearing before a Zoning Hearing

> Examiner. A Hearing Examiner's written decision may be appealed to Prince George's County Council, sitting as the District Council. The Council entertains oral argument and reviews the administrative record before making a final decision. the Council's final decision may be appealed to the Circuit Court for Prince George's County.

11126 Baltimore Blvd. v. Prince George's County, Maryland, 886 F.2d 1415, 1418 (4th Cir. 1989), set forth at APX.10.

Petitioner's bookstore began operations in June, 1975. APX. 89. After the first adult bookstore ordinance was passed, the petitioner reduced its stock in adult material to less than 25% so as to avoid classification as an adult bookstore. APX. 89-90. After the 1980 amendments, the County asked petitioner to reduce its adult stock to less than five percent or to obtain a special

exception, but petitioner did not do so. APX. 90. On July 2, 1985, the petitioner was cited for violating the ordinance when an inspection concluded that all of the stock on display was within the defined description and that petitioner did not have a special exception. APX. 90. On September 18, 1985, the Board of Zoning Appeals found there to be a violation and ordered petitioner to cease operation as an adult bookstore. APX. 90-91.

Petitioner appealed that order to the Circuit Court for Prince George's County. Petitioner's landlord filed an eviction action after receiving notice of the zoning violation, and the County filed court actions against both the petitioner and its landlord to enforce the Board of Zoning Appeals order. APX.

91-92. Petitioner then filed the present action in the United States District Court, and all other proceeding were stayed pending resolution of this case. APX. 92.

The district court found that the ordinance was a valid, content-neutral, "time, place and manner" regulation of such businesses. 11126 Baltimore Blvd. v. Prince George's County, 684 F.Supp. 884, 893 (D.Md. 1988), set forth at APX.110. However, the district court ruled that the ordinance was unconstitutional in two respects. First, the district court held that, while sufficient evidence exists to substantiate a finding that such businesses have negative secondary effects and the ordinance was directed at addressing these negative secondary

effects, the County Council had not received all this evidence prior to its vote, so the ordinance was unconstitutional. APX.126-127. The district court also struck down the ordinance because the criteria established for issuance of a special exception were vague and "subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores." APX.141.

The U.S. Court of Appeals for the Fourth Circuit then examined the ordinance in depth and found it to be completely constitutional. APX.1-68. After agreeing with the district court's finding that the ordinance was a content neutral time, place and manner regulation, APX.22, the court of appeals

addressed the sufficiency of the legislative basis for the regulation. After reviewing other cases on this issue, the court of appeals concluded that "there was less evidence before the City of Renton when its ordinance was enacted [subsequently upheld in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)] than in the record developed by Prince George's County when it enacted and amended the challenged ordinances." APX.37. As for the evidence submitted in the district court but not received by the County Council prior to its vote, the court of appeals observed that

> cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interest behind challenged regulations. It would appear from reviewing the Renton case, for example, that testimony of this nature was admitted at

trial and considered on appeal. APX.47. Thus, the court of appeals held "that the County sufficiently demonstrated substantial governmental interest in its regulations." APX.49-50.

On the issue of vague criteria subject to manipulation, the court of appeals was "persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements...do not confer unbridled discretion upon County Council and zoning administrators." APX.60. Thus, the judgment of the district court was reversed, and the ordinance found to be constitutional. APX.68. The petitioner now asks this Court to review that decision by way of writ of certiorari.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit is in harmony with decisions by this Court and other federal courts of appeals. Thus, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE ZONING STANDARDS AT ISSUE DO NOT OFFEND THE FIRST AMENDMENT BY GRANTING OFFICIALS UNDUE AND ARBITRARY DISCRETION TO DENY SPECIAL EXCEPTIONS FOR ADULT BOOKSTORES.

After reviewing the County adult bookstore and special exception ordinances, the evidence in the record, and applicable Maryland case law, the court of appeals held that the ordinances do not grant "zoning administrators and the District Council undue and arbitrary discretion to deny special exceptions to adult bookstores." APX.68 This conclusion was based, in large part on the

> [c]omprehensive, uncontroverted affidavits submitted by the Chief Zoning Hearing Examiner in Prince George's County, Barry S. Cramp, and the Chief of the Zoning Division of the Maryland National

> Capital Park and Planning Commission, Dale C. Hutchison, [which] explained in detail the review process for zoning and special exception applications in Prince George's County. As for the general requirements, pursuant to § 27-317 [of which petitioner complains as being too vague], a special exception applicant must demonstrate that the proposed use will not harm adjacent properties or the neighborhood by creating undue noise, conditions of blight, traffic congestion, unsafe conditions or similar problems. The general requirements of § 27-317 are satisfied by witnesses for the applicant explaining the proposed use and addressing specifically any problems, such as traffic, which are apparent from the application, the Technical Staff Report, or other evidence in the record.

(APX.57-58, emphasis added). Petitioner now argues that this decision conflicts with those of the federal courts of appeals for the First and Seventh Circuits. However, close review of the cases cited reveals that this is not true.

Perhaps the most clearly distinct case among these cited is Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980). Contrary to petitioner's claim, the Maciejewski decision did not turn on the specificity of guidelines in a content neutral, time, place and manner regulation -- it was a full-scale attack on an absurdly indefensible ordinance. As the Seventh Circuit noted,

> the entire adult movie zoning ordinance is nothing more than a one-line addition to the list of permitted and special uses in the Village of Westmont's zoning ordinance. Nothing that could be called a "legislative history" accompanies the ordinance. ...[I]t contains no definition of the term "adult"...The ordinance also gives no standards for its application by those who administer it...The only limitation is the "purpose" section[s] of the zoning ordinance...[which] simply define

two classes of special uses and do not provide any guidance whatsoever.

Id at 501-02. Furthermore, the court observed that the "Village of Westmont does not even attempt to advance a legitimate governmental interest to support the zoning ordinance. The Village admits in its brief that it enacted the ordinance to 'regulate the showing of sexually explicit movies'." Id at 504. Thus, the court concluded that "the ordinance satisfies none of the requirements for constitutional regulation of 'adult' fare under Young v. American Mini Theatres [427 U.S. 50 (1976)]." Maciejewski at 505. The language cited by petitioner, that the Maciejewski judges "doubt that any special use scheme for regulation of adult movie theatres would be

constitutionally valid," Id at 504, is obviously dicta and hyperbole. Comparing that statement with the complete, well-reasoned and specific decision by the Fourth Circuit in the instant case borders on the absurd, and certainly does not justify the extraordinary relief sought by the petitioner.

Petitioner also claims that the decision of the Fourth Circuit in this case conflicts with that of the Seventh Circuit in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980). Specifically, the petitioner claims that the Genusa court "invalidated an adult bookstore zoning ordinance because it required an applicant's premises to pass various municipal inspections prior to licensure that were not required for non

adult bookstores." (See, Petition at pp. 20-21). This grossly misstates the holding in Genusa, in which appellants challenged various zoning, licensing and employee permit restrictions on the operation of adult bookstores. The court held that the plaintiffs-appellants lacked standing to challenge the zoning provisions, except for the requirement that adult uses be separated by 500 feet, which it upheld pursuant to Young, supra. Genusa at 1211-12. Thus, it never addressed the degree to which any zoning criteria were so vague as to confer unbridled discretion on officials. The provisions ruled to be unconstitutional related to various license requirements for inspections, police investigations, applicant disclosures, and employee permits. Id

at 1221. As none of these provisions deal with the same matters as the instant case, there is no conflict.

The First Circuit case cited by petitioner is also not concerned with a zoning ordinance, but with a licensing provision. Fantasy Book Shop v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) struck down a public amusements licensing ordinance challenged by "three adult bookstores offering coin-operated motion pictures for pay in the City of Boston." Id at 1118-19. It should be noted that the petitioner again misstates the holding of the case as invalidating the ordinance "for vagueness and overbreadth" (Petition at 20), since the court explicitly declined to address an overbreadth analysis. Fantasy Book Shop at 1122-23, n. 9.

And, again, the decision is distinguishable from that in the instant case. Fantasy Book Shop involves a licensing scheme which set forth four criteria for denial of a public amusement license; two of which were that the license would increase the incidence of disruptive conduct in the area and that it would "otherwise significantly harm the legitimate protectable interests of the affected citizens of the city." Id at 1119. The First Circuit upheld the former criteria while striking down the latter under the theory that "the 'disruptive or illegal conduct' standard...serves as a necessary shorthand for a variety of particular objective occurrences, [but] this 'public interest' standard comprises purely subjective evaluations

of wholly unrestricted factors." Id at 1123. Although the distinction made is not obvious at that point of the decision, it becomes so when one recalls that the First Circuit explained it was determining the case "by a fact-specific examination of actual decisions, and not from the face of the ordinance." Id at 1122. Primary among the facts asserted by the plaintiff-appellants and adopted by the court were the "ongoing publicly-stated efforts" by the Mayor to eliminate the Combat Zone (a downtown Adult Entertainment District) and to "remove five pornographic outlets from the city" by rehabilitating the building in which the plaintiff-appellants were located. Id at 1119 and 1124. This is far different from the decision in the instant case. Indeed, the First

Circuit's "necessary shorthand" characterization, used in approving the "disruptive or illegal conduct" criterion, is in close accord with the Fourth Circuit's recognition that the special exception requirements "have unambiguous meanings" for zoning officials as set forth in the uncontroverted affidavits. APX.57, 68. Thus, the two decisions are more in accord than conflict.

Although much later in its argument, the petitioner also refers to a conflict with a Maryland Court of Special Appeals decision, which seems most appropriate to address here. In Landover Books v. Prince George's County, Maryland, 81 Md. App. 54, 566 A.2d 792 (1989), the Court of Special Appeals reviewed the same

ordinance at issue here and agreed with the Fourth Circuit analysis on all but one aspect -- the special exception criteria. The state court opined that it was "not persuaded by the rationale employed by the Fourth Circuit since it ignores the fact that some of the standards used in the process are vague," preferring instead the guidelines described in its previous opinion, 5297 Pulaski Highway, Inc. v. Town of Perryville, 69 Md. App. 590, 519 A.2d 206 (1987). Id at 78-79, 566 A.2d at 805-06. Again, the purported conflict is of little or no import when given closer analysis. Compare, for example, the valid criterion of "The purpose and intent of this Ordinance as set forth in its other sections," 5297 Pulaski Highway at 597-98, 519 A.2d 206, with the invalid criterion of "The

proposed use is in conformance with all the applicable requirements and regulations of this Subtitle." APX.8. Or, "The nature of the surrounding area and the extent to which the proposed use might impair its present and future development," Ibid, with "The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood." APX.9. The differences are negligible and certainly not so "special or important" as to justify review on writ of certiorari. It should be noted, in addition, that even were there a substantial conflict, this still would not come within the ambit of Rule 17.1(a), since the Court of Special Appeals of Maryland is an intermediate appellate court, Md. Cts. & Jud. Proc. Code, § 1-401, and not the

state court of last resort. See, e.g., Md. Cts. & Jud. Proc. Code § 1-301.[2]

II. THE FIRST AMENDMENT DOES NOT BAR THE REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS WHICH PROVIDES FOR PUBLIC HEARINGS AND PLACES THE BURDEN OF PROOF ON THE APPLICANT.

The petitioner sets forth as a Question Presented for review the following:

> Does the Prince George's County adult bookstore zoning law impose an unreviewable prior restraint forbidden by the First Amendment, because it requires an applicant for a zoning license for an adult bookstore to obtain a special exception through a multi-tiered administrative process that requires the applicant to sustain the burden of proof by

[2] Likewise, the four lower court decisions cited by petitioner in footnote 9, pp. 18-19, are of no avail to its argument. Although each can be distinguished, reconciled or explained, that would be redundant at this point.

> substantial evidence at an adversary, public hearing at which any member of the community can appear as an interested person with standing in the proceeding to offer evidence and oppose the application?

Petition at i. Although the question as presented is unclear, it appears that the petitioner is objecting to the use of public hearings in the zoning process and the allocation of the burden of proof on the zoning applicant. This position is not addressed in the petitioner's argument, and respondent is unaware of any case law to support it.[3]

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[3] Freedman v. Maryland, 380 U.S. 51, 58-60 (1965) does require a motion picture censorship board to bear the burden of going to court to suppress speech and, once there, to bear the burden of proof. However, this Court recently refused to extend this requirement to a licensing scheme directed at sexually oriented business since such a scheme "does not present the grave 'dangers of a censorship system'." FW/PBS, Inc. v. City of Dallas, 493 U.S. ___, ___, 110 S.Ct. 596, 606, 107 L.Ed. 2d, 603, 620 (1990).

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE FIRST AMENDMENT DOES NOT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS THAT NORMALLY TAKES SIX MONTHS, GENERALLY ALLOWS CONTINUED OPERATION OF BOOKSTORES DURING THE APPLICATION PROCESS, AND PROVIDES FOR JUDICIAL REVIEW.

The court of appeals decided that, although not every step of the administrative review process is bound by precise time limits, the uncontroverted facts show that application process for adult bookstores normally take six months, that the bookstores are generally allowed to continue operation while the application process continues, that six months is not an unreasonable time for processing an application and that there is no evidence that adult bookstores are treated differently from other special

exception applicants. APX.63-64. Petitioner now challenges these findings.

First, the petitioner asserts that "the process of administrative and judicial review can take over three years." Petition at 16. However, this assertion is unsupported by the citations to the record set forth in the petition, and is directly contradicted by the observations of both the district court and the court of appeals that petitioner failed to show the process has taken longer than six months. APX.143-144, 63-64. Likewise, the petitioner's claim that there is no provision "for expeditious judicial review," Petition at 21, is simply wrong. Maryland law is clear that the Prince George's County Council, when

sitting as the District Council in a zoning matter, is an "administrative agency" subject to the provisions of Maryland Rules of Procedure, Subtitle B. County Council v. Carl M. Freeman Associates, 281 Md. 70, 376 A.2d 860 (1977). Those rules, which "apply to the review of any final action of an administrative agency by a court," Rule B1, are replete with specific time limits. See, e.g., Maryland Rules B4, B7, B9, B12.

On top of these two gross misstatements as to the facts and law, the petitioner claims that the decision of the court of appeals directly conflicts with this Court's decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. ___. However, the record on specific time limits is sparse, and petitioner

has indicated to the district court his desire to reopen the case in light of FW/PBS if his petition for writ of certiorari is denied. See, Appendix A to this Brief. Thus, even if there were a possible conflict, the issue is not ripe yet for full presentation before this Court, and the petition should be denied.

IV. THE COURT OF APPEALS PROPERLY HELD THAT THE COUNTY COUNCIL HAD A SUFFICIENT LEGISLATIVE BASIS FOR ACTION, AND THAT THE COUNCIL MAY TAKE NOTICE OR ASSUME MATTERS OF COMMON KNOWLEDGE AND EXPERIENCE.

Petitioner next argues that the decision of the court of appeals conflicts with that of the district court, and the cases relied upon therein, on the sufficiency of a legislative basis for action. As described above, the district court had before it "a stack of

reports and studies regarding adult bookstore zoning regulations and an affidavit from a professional land-use planner supporting the rationality of the Council's enactment of its adult bookstore ordinances." APX.126. The district court readily admitted that these materials adequately met the standards set by this Court in United States v. O'Brien, 391 U.S. 367 (1968) and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1968), but refused to consider them as part of the legislative basis for the ordinance since the Council had not "received those materials prior to its vote." APX.127, citing Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) and Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).

The court of appeals closely examined the evidence before the City in Renton and found the evidence before the County in this case to be equally sufficient. APX.31-38. More importantly, the court of appeals properly found that the actual legislative record could be supplemented with "matters of common knowledge and experience," such as the material submitted to the district court. APX.38-40. The Keego Harbor and Basiardanes decisions do not support a rejection of this ruling.

In both cases, the ordinance at issue "effectively bans" adult theatres, Keego Harbor at 98 and Basiardanes at 1207, unlike the "incidental" burden on such protected activity present in the instant case and approved in Young v.

American Mini Theatres, Inc., 427 U.S. 50 (1976). Furthermore, and again unlike this case, the Keego Harbor and Galveston councils enacted the ordinances with a virtual "dearth of information," Keego Harbor at 98, and an "empty record", Basiardanes at 1215. Finally, and vastly different from the case at bar, Keego Harbor and Galveston presented little or no additional evidence at trial to support their claimed governmental interests. See, Keego Harbor at 98 ("the bulk of the evidence was presented by a City Planner who admitted having no special expertise with the effects of placement of adult theatres") and Basiardanes at 1215-16 ("at trial, Galveston offered no evidence of what vices would flourish if adult theaters were allowed

downtown....No evidence was introduced to supplement or bolster the City Council's assumption that one adult theater located downtown and urban blight are linked.")/4 The same is true of the only other case cited by petitioner, Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981), wherein there was no evidence to support the city finding that "the prohibition of certain sexually explicit films in

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/4 Another distinction, of lesser importance on this issue but somewhat revealing, is that both cities singled out adult theaters while having few if any zoning restrictions on such businesses as bars, pool halls, pawn shops, or massage parlors. Keego Harbor at 96 and 98, Basiardanes at 1216. Prince George's County, on the other hand, has special exception requirements for almost 100 various uses, ranging from abrasives manufacturing to country inns, and mini-warehouses to tourist cabin camps. See, generally, County Code, §§ 27-329 to 27-418.

specific areas of the City is immediately necessary and desirable." Id at 661.

V. THE COURT OF APPEALS PROPERLY ANALYZED THE ADULT BOOKSTORE ZONING ORDINANCE AS CONFORMING WITH THE FIRST AMENDMENT.

The petitioner contends that the court of appeals "did not analyze under O'Brien whether the special exception process serves a significant state interest and is narrowly drawn so as to render any incidental restriction upon First Amendment freedoms no greater than necessary." Petition at 26-27. However, there is no argument presented on this point, so respondent cannot adequately address the petitioner's contention. Respondent merely directs the Court's attention to the lengthy O'Brien analysis in the opinion below. APX.24-55.

VI. PETITIONER'S PLEA FOR "GRANDFATHER" STATUS IS UNSUPPORTED AND NOT PROPERLY THE BASIS FOR ISSUANCE OF A WRIT OF CERTIORARI.

Finally, the petitioner contends that the court of appeals "did not analyze under O'Brien that the revocation by ordinance CB 116-1980 of the 'grandfather' status previously afforded to adult bookstores existing prior to the enactment of CB 156-1975 and that the stated purpose of CB 116-1980 was the 'amortization of non-conforming adult bookstores'." Petition at p. 26. Once again, there is no argument, explanation or authority presented in support of this contention. Thus, it is impossible for respondents to reply.

However, it should be noted that the only mention of this issue made by

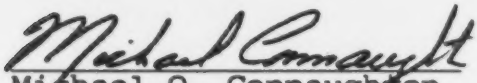
petitioner before the court of appeals was the following sentence: "There is nothing to substantiate the need to remove the grandfather status from adult bookstores predating CB 156-1975, a status expressly conferred upon them by CB 156-1975 and CB 104-1976." Appellee's Brief at p. 20. If this issue was not substantial enough to fully brief below, it certainly is not so "special and important" as to justify issuance of a writ of certiorari.

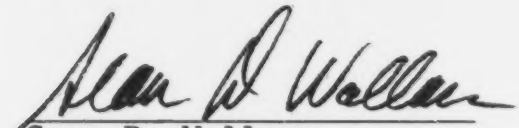
CONCLUSION

For the reasons set forth above, the respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL P. WHALEN
COUNTY ATTORNEY
PRINCE GEORGE'S COUNTY, MD

By: 
Michael O. Connaughton
Deputy County Attorney
Counsel of Record

By: 
Sean D. Wallace
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Upper Marlboro, MD 20772
(301) 952-5240
Attorney for Respondents

APPENDIX A

moc

HOWARD J. SCHULMAN
ATTORNEY AT LAW
SUITE 610
6 LIGHT STREET
BALTIMORE, MARYLAND 21202
(301) 576-0400

March 2, 1990

HAND DELIVERED

Honorable Frank A. Kaufman
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: 11126 Baltimore Boulevard, Inc.,
v. Prince George's County of Maryland, et al.
No. 89-1177, October Term 1989

Dear Judge Kaufman:

By memorandum dated February 4, 1990, the Court has requested that counsel for the Plaintiff inform the Court concerning the status of this case.

On January 23, 1990, the Plaintiff filed a Petition for Writ of Certiorari with the Supreme Court of the United States. A copy is enclosed. The Petition is presently pending. Additionally, should the Petition be denied, the Plaintiff intends to apply to this Court to reopen the case based on FW/PBS, Inc. v. City of Dallas, 58 U.S.L.W. 4079 (U.S. Jan. 9, 1990) (licensing schemes for adult establishments, including adult book stores, must provide reasonable time limits for the decision making process and for expeditious judicial review).

Thank you.

Very truly yours,

Howard J. Schulman

HJS:cat
Enclosure
cc: Michael O. Connaughton, Esquire
without enclosure

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